

SUBJECT: Evidence of consultation with a lawyer

COMMITTEE: Criminal Jurisprudence — favorable, without amendment

VOTE: 7 ayes — Place, Hartnett, Allen, Combs, De La Garza, Greenberg, Solis
0 nays
4 absent — Granoff, Nieto, Stiles, Talton

SENATE VOTE: On final passage, April 1 — 30-0

WITNESSES: For — Gerald Goldstein and John Boston, Texas Criminal Defense Lawyers Association. (Registered only — Suzanne Donovan, Texas Resource Center)

Against — None

BACKGROUND: The Texas Rules of Criminal Evidence protect communications between an attorney and a client. These communications cannot be used as evidence in a criminal trial. However, the privilege only exists if the client is obtaining legal services from the attorney. The privilege does not apply to communications that take place prior to the attorney's decision to take the case.

DIGEST: SB 1059 would prohibit the use, in a criminal case against an individual or entity, of the act of contacting or retaining an attorney, unless the act fell within an established crime-fraud exception.

SUPPORTERS SAY: Communications between an attorney and a client are privileged and may not be used as evidence in a criminal trial. However, the fact that an individual sought aid from an attorney can be used as evidence against that individual.

The attorney-client privilege is intended to encourage persons to obtain legal counsel. If an attempt to retain counsel can be used as evidence, people would be discouraged from seeking necessary legal advice.

The law currently offers protection to acts similar to contacting an attorney. For instance, the "act of production" privilege protects the act of producing a document from being used as evidence, even if the document itself is not privileged. SB 1059 would simply create a similar privilege for the contact and retention of counsel. Evidence that a lawyer conspired with a client to violate the law would still be admissible.

**OPPONENTS
SAY:**

Judicial holdings that permit introduction into evidence of the fact that a defendant contacted or retained an attorney consider that fact only in concert with the other circumstances of the case. Courts also have ruled that the attorney-client privilege does not protect an attorney from being required to disclose cash transactions with a client.

This type of evidence could lead a jury to reasonably conclude that a defendant may have participated in criminal activities, and so should not be withheld from evidence.